VIRGINIA LAW REGISTER

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We have received and examined with much pleasure and profit the Report of the Attorney General for the year 1914.

The Annual Report of the Attorney General for the Year 1914.

We do not know what provision is made for the circulation of this Report, but it should certainly be in the hands of every Attorney for the Commonwealth and offered for sale to the profession at large.

Mr. Attorney General Pollard and his able assistant have done their work well and whilst we cannot say that we entirely agree with them in all of the opinions rendered, yet the points of disagreement are very few. If any one thinks that the bed of the Attorney General of this State is one of roses, a perusal of this Report would soon disabuse him of this thought. Not only are the cases in court of the highest importance and involving much labor and study, but the many questions submitted for opinions are often intricate and of the greatest nicety. Many of them are in our judgment such as the Attorney General might have been well justified in ignoring, but even these are answered in no uncertain tones and with the greatest courtesy. One distinct feature of great value in this report is an excellent summary of the opinions of former Attorney Generals covering a period of thirty years—excepting of course such as are no longer applicable. These opinions are digested with reference to the sections of the Constitution, Virginia Code of 1904, and Acts of Assembly from 1906 to 1914, inclusive, of a permanent and general nature. By turning to the section of the Constitution and Code, or chapter and section of the Acts, and then referring to this Digest, the opinion can be found attached to the proper number of the section, etc., so that no difficulty

can be had in quickly ascertaining whether an opinion has been rendered upon the law embraced in any given section of the Constitution, Code or Acts. The great value of this Digest must be at once apparent.

We congratulate our Attorney General upon this Report and bear willing testimony to its value and trust that there may be some legislation hereafter which may enable any one desiring a copy to obtain it.

Wine and Cider.

Any construction of the "Byrd Bill" is rendered doubly hard by the involved and contradictory way in which the celebrated Act is expressed, and in no one of its sections is found more complication and involved language than in § 14, Vol. 3, Virginia Code, p. 766-774. The Assistant Attorney General well speaks of the form of that Section as "abominable." His construction of the Section is one with which we cannot agree, but we can very well see how any construction is open to dispute, for exception after exception and proviso after proviso characterize the involved provisions of this law. Indictments in the good old days used to read, "being instigated by the Devil and not having the fear of God before his eyes." We are inclined to think that the legislators who enacted this section were "instigated by some sort of Mephistophelean agency and evidently having the fear of the farmer vote before their eyes." Or else they had been imbibing some of the cider alluded to with considerably more than six per cent of alcohol therein. We quote the opinion of the Assistant Attorney General:

> "It will be noted that the first portion of the section relates to the manufacture and sale of cider, which is the pure juice of the apple, and so far as cider is concerned, the effect of the section seems to be as follows:
>
> "*First.* The general provisions of the act do not apply to the manufacture or sale of cider which is the pure juice of the apple, without any additional alcohol, distilled spirits, wine or any other intoxicating liquor or any mixture whatever, except preservations not prohibited by the United States law.
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> "*Second.* Cider that will produce intoxication shall not

be sold in quantities of less than five gallons in local option territory or in territory in which license to sell ardent spirits at retail has not been granted, except by the person growing or buying the fruit from which cider is made (or reading this paragraph positively—a person growing or buying the fruit from which cider is made may sell such cider in quantities of less than five gallons in local option territory, or in territory in which license to sell ardent spirits at retail has not been granted).

"*Third.* But no cider containing more than six per centage of alcohol at the time of sale shall be sold in local option territory or in territory where license to sell ardent spirits at retail has not been granted.

"*Fourth.* Nothing in this act shall prevent the sale of cider to be delivered to a common carrier to be transported to a place where ardent spirits may be legally sold nor to a licensed distiller for the purpose of distillation.

"After the foregoing provisions we find in the act this language:

"'Provided, further, that this act, except this section, shall not apply to the sale of pure wine, manufactured by the person growing or buying the fruit from which the wine is made; Provided, further, such persons may sell such wine to be delivered to a common carrier to be transported to some place where ardent spirits may be sold legally.'

"My construction of the above language is that, if you will insert in the numbered paragraphs above instead of 'cider' the words 'pure wine manufactured by the person growing or buying the fruit from which the wine is made,' you will find the law applicable to the sale of wine. In other words, in providing that the other sections of the Byrd Law do not apply to the sale of pure wine, etc., but in specifically providing that § 14 does apply thereto, the act necessarily means that whatever is the law made by § 14, as to the manufacture or sale of cider, which is the pure juice of the apple, the same provisions apply to the manufacture and sale of wine by persons growing or buying the fruit from which the wine is made.

"The form of § 14 is abominable in that it has exceptions to exceptions and provisos to provisos; but, after carefully reading the act, my conclusion, briefly stated, is that the law in regard to the sale of 'cider which is the pure juice of the apple,' is applicable to the sale of 'wine manufactured by the person growing or buying the fruit from which the wine is made.'"

This opinion would read "wine manufactured by the person growing or buying the fruit from which the wine is made," wherever the words "cider which is the pure juice of the apple" occur in the act, and therefore in the opinion of the Attorney General permit the sale of such wine just as cider—the pure juice of the apple—is sold.

Let us see how this would apply to section third. "No *wine* containing more than six percentage of alcohol at the time of sale shall be sold in local option territory or in territory where license to sell ardent spirits at retail has not been granted." Now it is well-nigh impossible to have a "wine," especially "homemade," with less than six percentage of alcohol and surely when the Legislature used the word "wine" it meant "wine," not grape juice. And how does the Attorney General get around the final "proviso:" "such persons," i. e. manufacturers of wine growing or buying the fruit from which the wine is made, "may sell such wine to be delivered to a common carrier, to be transported to some place where ardent spirits may be sold legally"? It is to be presumed this proviso meant something, but if the manufacturer of such wine had all the rights the seller of cider had, then this proviso is absolutely and utterly useless and unnecessary. We cannot so treat it, but in our judgment it was intended to limit the rights of the wine seller in local option or no license territory to sales only to a common carrier for transportation, etc. Else the proviso is nonsense.

Personally we would like to see the construction given by the Attorney General put upon this section, for we believe the use of pure wine is one of the best ways of promoting temperance and would encourage the industry of grape growing and pure wine making; but we can not believe this was the intention of the Legislature and so are constrained to disagree with the construction put upon § 14 by the learned Attorney General. And we may say that this section has been twice before one of the Nisi Prius Courts of this State, whose opinion was contrary to that expressed by the Attorney General.

Can an Express Trust in Real Estate Be Created by a Parol Agreement?

This question, the answer to which has for many years been somewhat doubtful, is finally answered in the affirmative by the decision of our Supreme Court of Appeals in Young *v.* Holland, decided March 11, 1915, Judge Keith delivering the opinion of the court. The opinion is based upon the fact that at common law an express declaration of trust even by parol is lawful and could be enforced; that by the English Statute of Frauds such an express trust is prohibited; but that no such express prohibition is found in our statute, the seventh and eighth sections of the English statute never having been adopted by us.

The facts in the case are these: Mrs. Young purchased from one Milliner a tract of land in Accomac and later a house and lot from Melson, paying cash for both purchases, but requesting the vendees to convey the same to one Holland, which was done. It was distinctly understood and agreed at the time of the purchase and before the conveyance of either of the parcels in land, that Holland was to collect the rents and profits and pay same to Mrs. Young during her natural life, to all of which Holland agreed. Holland was a daughter of Mrs. Young, in whom Mrs. Young had implicit confidence, but she betrayed it by claiming the land as her own and refusing to account for or pay over any rents or profits. The deeds were absolute on their face.

The case at first blush seemed without much difficulty, for as a general rule where land is purchased by one person and the conveyance taken by another a resulting trust arises. Bank *v.* Carrington, 34 Va. (7 Leigh) 566. But Mrs. Young was the mother of Mrs. Holland and according to the principle laid down in Dyer *v.* Dyer, 1 Lead. Cas. in Eq. (W. & T.) 266, no resulting trust arises where the purchase is made by parent and conveyance taken in the name of the child. In addition to this Mrs. Young gave explicit directions to have the deed made to Mrs. Holland.

As far back as Walraven *v.* Lock, 2 Pat. & H. 547, Judge Nash held that as a deed absolute on its face could be shown by parol testimony to be a mortgage, so it was competent to prove

by parol testimony the express or agreed conditions upon which the legal title was acquired.

The question seemed to have been before our Court in Sprinkle *v.* Hayworth, 67 Va. (26 Gratt.) 384; Borst *v.* Nalle, 69 Va. (28 Gratt.) 423; Jesser *v.* Armentrout, 100 Va. 666, 673, 42 S. E. 681; but was not decided, being deemed unnecessary to answer, and in Garrett *v.* Rutherford, 108 Va. 478, 481, 62 S. E. 389, the Court said "that the question is an open one in this State whether an express trust affecting real estate is valid unless in writing."

It seems to us in view of Walraven *v.* Lock, 2 Pat. & H. 547, that the language used in Garrett *v.* Rutherford was a little bit too broad, for certainly the former case was a decision directly in favor of an affirmative answer; and to the same extent was Bank *v.* Carrington, 34 Va. (7 Leigh) 566, and our Court quotes Browne on the Statute of Frauds, § 80, in which the author of that treatise seems to entertain no doubt that in *Virginia* the statute would not apply to a trust created verbally because that State had not adopted the seventh section of the English Statute and retained the fourth. Professor Minor, however, in his Institutes, 2nd Minor's Inst. (4th Ed.), p. 487, takes a contrary view, but gives no reason.

We do not think there can be the slightest doubt that the decision as laid down in Judge Keith's clear and able opinion is eminently sound. For the failure of our Legislature to adopt the seventh and eighth sections of the English Statute clearly indicates that our law-making body did not intend to change the common-law rule, and the result is that an oral declaration of trust in real estate can be established by parol testimony in Virginia, just as it could in England at Common Law before the adoption of the English Statute of Frauds.

Verbal Promise to Assume a Debt.

The Statute of Frauds is not alluded to in Goode *v.* Bryant, decided by our Supreme Court of Appeals March 11, 1915, and an examination of the case plainly shows that no allusion to that statute was necessary. And yet when one first glances at the syllabus it might seem as though the

case was one within the statute, a careful reading, however, easily dispelling that idea.

The syllabus reads that "A verbal agreement on the part of a purchaser of real estate to assume and pay a debt secured by a deed of trust on the land purchased, is as effective and binding as if it were recited in the contract and conveyance, and the *debt becomes the primary obligation of the purchaser.*" (Italics ours.)

The soundness of this decision is unquestionable and supported by ample authority: Gayle *v.* Wilson, 71 Va. (30 Gratt.) 166, 173; 2 Devlin on Real Estate, §§ 1052-1073; 1 Jones on Mortgages, § 750; and Willard *v.* Worsham, 76 Va. 392, 395, sustain the proposition italicized. The reason is apparent. There is no promise to *pay the debt of another*, but the promise to pay a debt due to the promisee by discharging a debt due by that promisee to another.

The opinion in this case and in several others handed down at the March term, is by Judge Kelley, who handed down his first opinions since becoming a member of the Court at that term. We think that the State has reason to congratulate itself upon the selection of this Judge for the high office in which he now makes his first appearance, for his opinions are well written, carefully considered and worthy of the best traditions of the great tribunal of which he is now a member.

Public Policy—Insurance —Suicide of Insured.

And yet we are not certain that the opinion of Judge Kelley in the case of Security Life Insurance Co., etc. *v.* Dillard, March 11, 1915, does not go too far in asserting that *in any case* where a sane person whose life is insured commits suicide, there cannot be a recovery. This opinion, which is the unanimous decision of the Court, is certainly against the weight of authority in the United States, although our Court follows the case of Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139, 42 L. Ed. 693, 18 S. Ct. 300. But since the opinion in that case was rendered it has been repudiated or distinguished, it being generally considered that that state of mind which induces suicide, if it arises after the incep-

tion of the policy, is one of the risks assumed by the insurer. Vance on Insurance, p. 518, and cases cited.

Especially is this the case where the policy is taken out for another person than the insured.

Nor are we entirely satisfied that our Supreme Court is justified in departing as it does in this case from its well-settled rule, reiterated in more than one case handed down at the March, 1915, term—that no point not raised in the lower court will be considered by the Supreme Court. No question of public policy was raised in the lower court, the only point made being that the self-destruction of the insured was not a risk assumed by the insurer.

The Court holds that "public policy" overrules all mere formal rules of procedure. The danger in this decision is the tremendous latitude it may give the courts in determining what is "public policy"—a term too often abused.

The language of this decision, too, is broad enough to cover the case of a policy which expressly waives any defence on the part of the insurer on account of the suicide of the insured after the policy has run a term of years. This is now a common provision in most life insurance policies, and we see no good reason either on the ground of public policy or otherwise, why such a provision should not be held good. For Judge Kelley expressly says that suicide as a defence can "no more be waived either intentionally or unintentionally by stipulations in the pleadings than by *provisions* or omissions *in the contract in litigation.*" (Italics ours.) We do think that this stretches the doctrine a good deal further than necessary, but of course being as to this point obiter, the Court may not hold itself bound by it upon a case arising where the policy expressly waives the defence of the suicide of the insurer after a term of years has elapsed from the date of the policy.

The Foot Passenger's Right of Way.

In England if a cab or motor bus runs over and injures a foot passenger the driver or chauffeur is punished. In France the foot passenger is punished for getting in the way. The law in America, as far as we are advised, remains as at Common Law, but the way in which motor

cars hoot and toot at the unfortunate foot passenger who gets in their lordly way, would seem to indicate that the Common Law rule was no longer of force in this country as far as they were concerned. Few of the hooters and tooters seem to realize that the object of the horn, or rather the sound of it, is to give notice of their own proximity, which is the legal reason for the operation, though most people would be disposed to say that it was meant as a warning for the unfortunate foot passenger to speed himself out of the way. This is usually the effect, but it is well enough sometimes to call to memory the fact that a foot passenger is entitled to the right of way. This rule has lately been called into operation in the city of London, in the case of Rex *v.* Allgood. Lieutenant Everest was crossing Coldharbour Lane, Camberwell, with a platoon of a Territorial Reserve Battalion (some fifty or sixty men), when the defendant's taxicab came along the road and, instead of waiting at the crossing to let the troops cross, drove right through their ranks. The officer had signalled to the defendant that his platoon was about to cross the road, but the driver had taken no notice; he afterwards alleged in his defence that he had endeavored to pull up, but had been unable to do so through the wetness of the road. Most motorists, when they run down a passenger in their way, say they were unable to stop; the truth nearly always is, of course, that they do not attempt to stop until the very last moment, when it is clear that the passenger will not hurry out of their way—and then it is often too late. Allgood was convicted of driving to the public danger, and sentenced to a fine of £20, with suspension of his license for twelve months.

A Distinction with a Remarkable Difference.

It remains for an English Judge with the somewhat remarkable name of Bailhache to draw a distinction between the words *force majeure* and *vis major,* which to say the least is somewhat remarkable. The two terms mean exactly the same thing if literally translated, but Bailhache, J., in the case of Matsoukis *v.* Priestman, decided a few months ago, held that *force majeure* was much more extensive than *vis major.* A contract to build

a ship contained a clause by which the builder agreed that, if the ship was not delivered entirely ready to the purchaser on a specified date, he would pay the purchaser £10 as liquidated damages for each day's delay except only the cause of *force majeure* and (or) strikes of workmen of the building yard where the vessel was being built, or of the workshops where the machinery was being made or at the works where the steel is being manufactured for the steamer or any strike of any sub-contractor. The ship was delivered 175 days late and the question was, how many days were covered by the exceptions. There had been a delay of 70 days caused by the great strike of 1912, and this was held to come within the exception of *force majeure*, a term which the judge held to be more extensive than either act of God or *vis major*. *Force majeure* was also held to cover a delay of 7 days caused by a breakdown of machinery; but it did not cover delays caused by bad weather, or absence of workmen at football matches, or a funeral. So the builder had to pay £10 a day for the remaining 98 days.